Filed 2/25/19 P. v. Frazer CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL EUGENE FRAZER,

Defendant and Appellant.

F073793

(Super. Ct. No. CRM015875)

ORDER MODIFYING OPINION AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed on January 31, 2019, be modified in the following particulars:

1. On page 23, under the heading, "Relevant Background," insert the following paragraphs and footnote:

> On July 22, 2015, appellant's advisory counsel filed a written objection to the admission of cell phone records. Attached to it were several documents that appeared to indicate the prosecutor had attempted to obtain appellant's authenticated cell phone records but was informed by AT&T the records had been purged by Cricket:
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> - An invoice dated March 2, 2010, issued by Cricket to DOJ/FBI – Modesto/Stockton for $55 for subscriber information and call history for appellant's phone number.
>
> - A subpoena duces tecum dated May 14, 2015, issued by the prosecution to Cricket for appellant's call detail records.

- AT&T's response to the May 14, 2015, subpoena duces tecum, which indicated "usage records for this particular network are only stored for a rolling six months," and because the request did not fall within the time frame for which records are stored, "no usage records are available for us to produce."

- A fax cover sheet from the prosecutor to AT&T, dated May 27, 2015, which states:

  "This request is URGENT (because we are coming up for Jury Trial).

  "Please provide the records that are requested in the attached Subpoena Duces Tecum. The address to mail the records and declaration is the Merced County Superior Court. The address is located on the subpoena.

  "Attached are the records we have received from Cricket but we need CERTIFIED Copies with a filled out Declaration of Custodian of Records (which is attached).

  "It is ok to discuss any matters related to this request with either Jim Cook or Chris Cook."

  Attached to the fax cover sheet was a subpoena duces tecum dated May 27, 2015, and a blank form declaration of custodian of records.

- An email sent from another employee from the prosecutor's office to AT&T dated May 27, 2015, with the same language as the fax. Again, no documents purported to be attached to the email were attached to the objection.

- AT&T's response to the prosecutor's May 27, 2015, request stated the same language as the first response, indicating no usage records were available to produce because the request did not fall within six months of the period for which the records were requested.

- An unsigned document purportedly authored by James Finklea, dated June 6, 2015. The document states James Finklea is a compliance security analyst and serves as the custodian of records for AT&T. It states "[a]fter a thorough search of the documents relied on in the course of my duties …, I was unable to find any

information responsive to your request regarding [appellant's phone number.]"

- An affidavit signed by Dana Morgan-Williams dated June 17, 2015. She identified herself as a legal compliance analyst and custodian of records. The affidavit states: "Attached to this Affidavit are true and correct copies of subscriber information and/or call detail issued by AT&T for the following accounts: [¶] [appellant's phone number]. [¶] The attached copies of billing records are maintained by AT&T in the ordinary course of business. I maintain and routinely rely on these documents in the course of my duties as Custodian of Records and Legal Compliance Analyst." In one instance, the document states James Finklea, not Dana Morgan-Williams, was sworn by the notary. It is not clear what documents, if any, were attached to this affidavit.

- A Cricket subpoena compliance document dated July 21, 2015,[3]

[3] Appellant's points and authorities in support of his written objection describes this document as one supplied in approximately 2010, but the document is dated July 21, 2015.

addressed to DOJ/FBI – Modesto/Stockton, which states: "The call detail records information you requested is not available for the time frame designated. Non-billed call switch data is purged at approximately six months." There is no telephone number listed on this document, but one of the reference numbers on this document matches one on the Cricket invoice dated March 2, 2010.

The objection was based on the ground raised in this appeal—that the records could not be properly authenticated because they had been purged by Cricket years earlier and were not in possession of AT&T. The court held a hearing pursuant to Evidence Code section 402 the same day, July 22, 2015, in response to appellant's objection. The prosecution's wireless expert testified.

2. On page 23, under the heading, "Relevant Background," delete the first paragraph commencing with "Appellant's advisory counsel" and insert the following paragraph and footnote in its place. This modification requires the renumbering of all subsequent footnotes.

The expert witness testified he had been in the wireless industry for over 28 years and had been trained by virtually every major carrier: Cricket, AT&T, Contel, GTE Mobile Net, Sprint, Nextel, Boost, Metro PCS, Verizon, T-Mobile, Mountain Cellular, Golden State Cellular, "just to name a few." He identified call detail records related to appellant's phone number.[4] The records covered the period from 9/2/2009 through 12/5/2009. The expert testified he received copies of the records in 2010 from the Livingston Police Department. A copy of the application for the records by the U.S. Attorney's Office, and the order signed by a U.S. Magistrate, dated February 8, 2010, was received into evidence for the purpose of the hearing. In May 2015, AT&T purchased Cricket. From then forward all Cricket custodian of records requests were directed to AT&T.

3. On page 34, after the last paragraph before the heading, "DISPOSITION," insert the following paragraphs:

Appellant contends the prosecutor's conduct violated his right to due process. "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. In other words, the misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. A prosecutor's misconduct that does not render a trial fundamentally unfair

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[4] Appellant's name was reflected in the carrier subscriber information in the document. During trial, appellant admitted the phone number the records corresponded to was his.

nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Clark* (2011) 52 Cal.4th 856, 960, citations and internal quotations omitted.)

Appellant cannot show error on either federal or state grounds because we find no error in the court's admission of the cell phone records. What the prosecutor did to obtain the affidavit authenticating the records was known by the trial court. The court was aware the prosecutor made several attempts to obtain an affidavit authenticating the records. It was aware Cricket and AT&T communicated the records had been purged. It was aware the prosecutor sent the affiant the records the affiant authenticated. Despite all this, the court found the records reasonably trustworthy to be admitted based on the evidence presented at the Evidence Code section 402 hearing. Because we hold the admission of the records was not an abuse of discretion, we cannot say that appellant's trial was rendered fundamentally unfair. Any "deceptive or reprehensible methods" used by the prosecutor to persuade the court of the veracity of the records were neutralized by the written objection to the admission of the records and the court's consideration of those methods. Appellant's claim is impliedly premised on the fact that there was no possible way for the records to be authenticated but for the prosecutor's conduct. Not so. The prosecutor could have obtained a more detailed affidavit from the AT&T custodian of records, which explained how she was able to authenticate the records, without any appearance of feigning they were in AT&T's possession all along. Had this been the case, we are confident the records would have been admitted (though a Evidence Code section 402 hearing may still have been necessary). Thus, appellant cannot show it is reasonably probable a result more favorable to appellant would have been reached without the alleged misconduct. (See *People v. Tully* (2012) 54 Cal.4th 952, 1010.) We will note, in order to further clarify our conclusion, had similar conduct gone unnoticed by appellant's advisory counsel and the court, and an Evidence Code section 402 hearing not been held, appellant's claim may have some merit. This is simply not the record before us. Appellant has not shown reversible error. He has not shown the prosecutor's conduct rose to the level of a due process violation nor that appellant suffered prejudice as a result of the prosecutor's conduct.

Except for the modifications set forth above, the opinion previously filed remains unchanged. This modification does not effect a change in the judgment.

Appellant's petition for rehearing filed on February 11, 2019, is denied.

_____
DE SANTOS, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
SMITH, J.

Filed 1/31/19 P. v. Frazer CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL EUGENE FRAZER, Defendant and Appellant.	F073793 (Super. Ct. No. CRM015875) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christopher J. Rench, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Daniel Eugene Frazer was convicted by jury trial of two counts of first degree robbery. On appeal, he contends (1) as a self-represented, incarcerated defendant, he was denied adequate legal resources in violation of his constitutional rights; (2) the

court erred when it denied his request for a trial continuance; and (3) the court erred by admitting cell phone records under the business records hearsay exception. We disagree and affirm.

BRIEF FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2011, appellant was charged by complaint with two counts of robbery (Pen. Code, § 211[1]) and three enhancements for prior convictions (§§ 667, subds. (b)-(i), 1170.12, 668) and was arraigned on the complaint on May 13, 2013. At his arraignment, appellant waived his right to counsel and exercised his right to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Following a preliminary hearing, appellant was held to answer to the charges on November 8, 2013. A first amended information was filed on January 29, 2015, charging appellant with two counts of robbery (§ 211) and four enhancements for prior convictions (§§ 667, subds. (b)-(i), 1170.12, 668). Trial commenced on July 15, 2015.

Prosecution Case

The charges alleged in the information arose out of a bank robbery that occurred on November 6, 2009, against two tellers working at the bank. The primary issue in the case was identity. The robbery occurred in Livingston, California, at approximately 10:21 a.m. The robber entered the bank with a lunch box-sized cooler. He wore a mask with cutouts for his eyes and nose, eye glasses, and latex gloves. He approached a teller, J.S., and demanded "100s and 50s." She gave him the money, and the robber went to the window of the other teller, S.S., and demanded "100s and 50s." S.S., too, handed over money. The robber did not display a weapon or use a note.

S.S. testified the robber had a similar skin tone and build to appellant. J.S. testified the complexion of the robber was the same as appellant's and that they had the same eyes.

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[1] All further statutory code references are to the Penal Code unless otherwise noted.

An expert witness in cellular technology testified he had reviewed cell phone records related to appellant's phone and that at 9:58 a.m. on the day of the robbery, appellant's cell phone connected to the cell site that covered the same location as the bank where the robbery occurred, raising an inference he was in the vicinity of the robbery when it occurred.

The prosecution offered evidence of three other robberies that took place in San Joaquin County on September 11, 2009, October 6, 2009, and December 4, 2009, to prove identity pursuant to Evidence Code section 1101, subdivision (b). Appellant was apprehended after the December 4, 2009, robbery at the end of a high-speed chase. At the time, he denied the September and October robberies, though DNA evidence later tied him to those robberies. He pled guilty to the December 4, 2009, robbery and testified at trial he committed all three.

The September 11, 2009, robbery occurred at approximately 11:30 a.m. Appellant wore a mask with cutouts for his eyes and surgical gloves. He yelled at the tellers that he wanted "100s and 50s." He did not use a gun or a note during the robbery.

The October 6, 2009, robbery occurred at the same bank as the September robbery at approximately 10:45 a.m. Appellant wore a mask with cutouts for his eyes and surgical gloves. He approached two tellers and demanded 50's and 100's from each.

The December 4, 2009, robbery took place in the same town as the first two robberies at a different bank at approximately 10:04 a.m. Appellant approached the teller window and yelled that he wanted "100s and 50s." He did not use a gun or a note. He was carrying a spray bottle. After he was arrested, he told law enforcement he never uses weapons because he does not want to hurt anyone and "[y]ou don't need a gun to rob a bank." He said he typically carries something in his hand to give the appearance he has a reason to be walking around the bank, and this is why he carried the spray bottle.

Defense Case

A detective testified that J.S. was unable to identify appellant in a photo lineup. Appellant also testified. He denied committing the charged November robbery and admitted to committing the three uncharged robberies. Appellant also testified he never used a gun or note and wore his glasses during all his robberies.

Appellant was found guilty of both counts of robbery. A bifurcated bench trial was held on October 16, 2015, on appellant's prior convictions. The prosecution dismissed two of the alleged prior convictions, and the trial court found the remaining two allegations true. Appellant was sentenced to a term of imprisonment of 25 years to life on count 1 and a concurrent term of 25 years to life on count 2.

DISCUSSION

I. Appellant's Access to Legal Resources

Appellant contends he was denied access to legal resources in violation of his Sixth Amendment right to self-representation and his Fifth and Fourteenth Amendment rights to due process of law, equal protection, access to court, and a fair trial. We disagree.

A. Relevant Background

In order to put appellant's complaints in proper perspective, we set forth the pertinent portion of the record in some detail. On May 13, 2013, after granting appellant the right to represent himself, the court informed appellant he would be tasked with making requests for references such as the Evidence Code in writing and "in appropriate form." Appellant said he understood. The court told appellant it would take an oral request at that time, but appellant would also need to make his request in writing. Appellant orally requested Witkin & Epstein's Criminal Defense Practice and Procedures, the Evidence Code, California Criminal Law, annotated version, the Penal Code, California Criminal Law: Procedure and Practice (Cont.Ed.Bar), and Black's Law Dictionary. He also requested legal tablets and envelopes. The court informed him it

would provide him with the Evidence Code, the Penal Code, California Criminal Law: Procedure and Practice (Cont.Ed.Bar), and Black's Law Dictionary, but not a Witkin treatise because it would be redundant. The court told appellant it would provide him with the materials at the next court date, the following Thursday. Appellant did not waive time, and the court set a preliminary hearing for May 20, 2013. We cannot find in the record a formal written request for the items appellant orally requested.

It appears from the record appellant did not get all the materials he requested by the next court date, May 16, 2013, because the minute order for that appearance indicates appellant waived time and the matter was continued for prepreliminary hearing and a "status on materials." On May 22, 2013, appellant submitted an inmate grievance form dated May 20, 2013, wherein he stated he was unable to locate staff to provide him access to "Equipment for viewing CD containing legal material; [¶] Phone to conduct non recorded legal calls; [¶] Photocopy of legal material; [¶] Notarize legal document; [¶] Certified mailing." He also filed a written motion for access to funds for purchase of legal material (stationary items) and to hire the services of a legal investigator, with citations to sections 971-978. Neither document requested any books or legal research. On May 22, 2013, the court ordered six CDs of discovery to be checked into appellant's property and appointed an investigator to assist appellant. On May 31, 2013, the court provided a 2009 Evidence Code book to appellant in court.

On July 16, 2013, appellant filed a motion for funds to purchase transcripts, which the court took under submission. On July 30, 2013, the court approved 80 "additional" hours for appellant's investigator, and an "additional" $60 was applied to appellant's phone.

On August 16, 2013, appellant filed a motion for judicial notice pursuant to Evidence Code section 451. He requested the court take judicial notice of specific sections of both the Evidence Code, the Penal Code, and the United States and California Constitutions, as well as a few cases.

The same day, appellant also filed a motion to dismiss for denial of a speedy trial, making several citations to law and attaching many supporting documents. In preparation of this motion, appellant's investigator had served several subpoenas duces tecum, and appellant had filed a formal request for discovery, with citations to section 1054 and case law. Appellant had also filed a document entitled "Evidence Disclosure by Defendant," which set forth several documents appellant claimed he would use in his forthcoming speedy trial motion. Throughout the hearing on the speedy trial motion, appellant made several references to appropriate case law and indicated he had read the cases. On September 27, 2013, after a lengthy hearing, appellant's speedy trial motion was denied.

On October 21, 2013, appellant filed a motion for appointment of advisory counsel. The court heard the motion on November 1, 2013, and appellant informed the court he desired advisory counsel "solely for the purpose of having someone that can act as a mediator between myself and the court. I'm not able to ask for a sidebar. I was going to use counsel." Regarding his preparation for the preliminary hearing, appellant told the court, "Everything I need done is done." The court told appellant it did not think his case was complex enough to warrant advisory counsel at that stage of the proceedings and indicated it would deny the motion. Appellant stated he agreed with the court and withdrew the motion. Appellant never indicated on the record he needed advisory counsel to help him perform legal research or prepare in any way for his preliminary hearing.

The preliminary hearing was held on November 8, 2013. On November 18, 2013, the court held appellant to answer to the charges. On the same day, appellant filed a motion for appointment of a paralegal. An information was filed on November 27, 2013.

On December 2, 2013, appellant filed a motion to dismiss the information pursuant to section 995, making several citations to law. The motion was based on the ground there was no probable cause to hold him to answer on the face of the ruling and

also that certain evidence presented at the preliminary hearing had since been proven to be incorrect and the remainder of the evidence failed to support the order holding appellant to answer. The court did not consider appellant's latter contention, noting that a section 995 motion was not the proper way to bring up the issue regarding the incorrect evidence. The court held there was enough evidence presented at the hearing to support the order holding appellant to answer and denied appellant's motion. Appellant was subsequently arraigned on the information and asserted his right to a speedy trial. The court set a trial date of February 11, 2014.

On January 6, 2014, appellant sent a letter to the Merced County District Attorney's Office entitled "PC § 1473 Writ of Habeas Corpus; False Evidence – Can Issue in this Matter" with several attachments alleging he was held to answer based on false evidence. This packet was delivered to the court but not filed. On January 10, 2014, appellant filed a document entitled "Notice: Deputy DA … has Violated Pen. Code §§ 133, 134," alleging the prosecutor presented false evidence at the preliminary hearing. On January 10, 2014, the court indicated it had received appellant's packet entitled "PC § 1473 Writ of Habeas Corpus …," admonished appellant for not complying with rules of procedure and stated the matter had already been reviewed via appellant's section 995 motion.

On January 8, 2014, the court granted an additional 40 hours for appellant's investigator. On January 10, 2014, the court heard appellant's paralegal request from November. Appellant indicated the reason he wanted a paralegal was to "Shepardize" cases. The court replied that appellant did not need a paralegal for that reason. Appellant stated he needed the paralegal to go find cases for him because he does not have access to the law library. The court told appellant he would need to make the request in writing and that the court would try to make it possible for appellant to do the work himself rather than expend funds for a paralegal. Appellant responded by saying he only had 30 days until trial and asked the court how this could be accomplished in 30 days. The court

informed appellant if he needed to request a continuance he could. We can find no written request in the record for resources to find or "Shepardize" cases.

On January 31, 2014, appellant filed a petition for writ of habeas corpus alleging he was committed on false evidence. On March 12, 2014, appellant's petition was summarily denied because it failed to conform to the rules of court.

On March 7, 2014, appellant filed a "Motion for Judicial Notice," which alleged the matter must be dismissed because the order holding appellant to answer was based on false evidence. A LexisNexis printout of a case was attached to the motion.

On March 14, 2014, the court heard appellant's motion for judicial notice. The court informed appellant it would not "revisit the 995," but on March 20, 2014, the court had appellant view the evidence in open court and told the parties it wanted to set a readiness conference because it wanted to consider the issue at greater depth and review the preliminary hearing transcript.

On April 18, 2014, appellant indicated to the court that he had retained an attorney, and the matter was continued. On April 25, 2014, appellant told the court he had not hired an attorney. The same day, appellant filed a document entitled "Request Completion of March 14 Judicial Notice Hearing//Question of Defective Holding Order." On June 20, 2014, the court revisited appellant's "Motion for Judicial Notice," which it reclassified as a nonstatutory motion to dismiss. Again, the motion was based on the same alleged problems with the evidence introduced at the preliminary hearing. The court entertained lengthy argument. Appellant indicated he received the prosecution's response at 3:00 a.m. that morning, and the court asked appellant if he had enough time to review the response. Appellant assured the court he was ready. During argument, the court informed appellant it believed he had misinterpreted a case he cited. The following exchange ensued:

"[APPELLANT]: Your Honor, remember, you don't let me have a paralegal to shepardize. You said I must use what I have. All I have is California Practices, that's all I have.…"

"THE COURT: … I'm sure you probably haven't had a chance to read Merrill versus Superior Court which [the deputy DA] cited; right?

"[APPELLANT]: I don't have access to anything other than my book. [¶] … [¶] … No, I don't have access to that [case].

"THE COURT: Well, you would— [¶] … [¶] —if I gave you the time, because what you would do is ask [your investigator], '[investigator], could you get a copy of this case for me?' [Your investigator] would go down—the law library not only has a book library, but more and more increasingly they've obviously got the computer, okay, and you don't need a paralegal to shepardize when all you have to do is put in—

"[APPELLANT]: How do I know that case, Your Honor?

"THE COURT: Well, sir, how did you get those cases that you just cited?

"[APPELLANT]: Out of the California Practices book, Your Honor.

"THE COURT: Okay, but what I'm saying is you clearly understand the citation system. You can't—you can't have it both ways. You are intelligent, Mr. Frazer, and have articulated to me that you know the basics of case law and how to find case law and how to cite it. So when I asked you if you had enough time—be fair to the Court, Mr. Frazer, because you're being absolutely totally unfair if you think about it. I asked you if you wanted more time, and now you're saying, 'Well, how am I supposed to get it?' Mr. Frazer, is that really fair to the Court when I've afforded you every opportunity and all you have to do is give [your investigator]—I've given you every resource you've asked for up until now. [Your investigator] has not been denied any ability to investigate; right?

"[APPELLANT]: My phone is shut off, I've been denied.

"THE COURT: No, I'm talking about—no, you indicated to the Court you were trying to hire an attorney. That is not a proper use of resources, so I denied that request. You're right."

The court denied appellant's motion to dismiss. Appellant then requested a specific attorney to be appointed to his case, which the court granted. On June 26, 2014, the attorney accepted appointment.

On May 1, 2014, appellant filed a second petition for writ of habeas corpus. On June 4, 2014, the petition was denied on the grounds that writ review is not an appropriate avenue through which to resolve pretrial discovery disputes and that the issue was moot because of the hearing on March 20, 2014.

On August 25, 2014, appellant's appointed counsel filed a nonstatutory motion to dismiss on the same grounds challenging the order holding appellant to answer already raised by appellant. The motion was heard on September 11, 2014.

On September 26, 2014, the court provided the parties with a written denial on the motion to dismiss. On October 8, 2014, appellant's counsel filed a response to the court's ruling on the motion to dismiss. On October 10, 2014, the court again heard argument on the motion, and subsequently denied it. On October 21, 2014, appellant's counsel wrote a letter to appellant indicating she does not believe a writ petition challenging the court's denial of the motion she submitted on his behalf would be successful.

On December 2, 2014, appellant executed another *Faretta* waiver, and appellant's counsel was relieved.

On December 5, 2014, appellant filed a motion for appointment of investigator and a paralegal. On that same date, the court issued a written order authorizing investigator services. The court issued a separate order indicating it had tried to secure a paralegal from the Merced County Public Defender's Office, but they declined. The court authorized paralegal services provided appellant could locate one willing to accept the assignment. The court also ordered appellant be provided with postage stamps, two legal size tablets of paper, a 2015 calendar, $100 on his phone card, and California Criminal Law: Procedure and Practice (Cont.Ed.Bar 2012).

On January 8, 2015, appellant filed a motion for disqualification of the prosecutor, wherein he again raised many of the grounds related to the evidentiary issues at the preliminary hearing. The motion was denied on January 27, 2015.

On January 27, 2015, appellant filed a third petition for writ of habeas corpus alleging the same evidentiary issues from the preliminary hearing. On February 26, 2015, the court denied review of the petition on the grounds it alleged "the same claims that have already been reviewed and denied."

On February 13, 2015, the deputy district attorney filed a memorandum indicating he believed appellant was engaging in delay tactics. He requested that at the next court hearing, the court ask appellant whether he would like standby counsel, set a trial date, and deny all future requests for continuances in the absence of good cause. On February 13, 2015, appellant filed a motion to disqualify the judge pursuant to Code of Civil Procedure section 170.6, subdivision (a)(1), alleging the court's "prejudicial use of—confirmed—false evidence ... [made] it difficult (if not impossible) to get a fair hearing before this court." The judge filed an answer, and another judge denied the motion on March 12, 2015.

On February 13, 2015, the court gave appellant options for how to proceed. It indicated appellant could be appointed an attorney for all purposes, continue to represent himself, or represent himself with "standby counsel." The court stated standby counsel would have a limited scope of responsibility, which would be to assist and advise with respect to trial issues, including "motions in limine, preparation of—to cross witnesses, subpoenaing witnesses, and examination of witnesses preparing opening statements, closing statements, addressing instructions issues to the jury. ... His scope would be to assist and advise [appellant] in preparation for trial." The following colloquy occurred:

> "[APPELLANT]: I understand the limitations that you indicated, your Honor. I'm still looking at my options. Really I wanted a paralegal because I have *pretrial issues that go beyond just mere preparation for*

> *trial*. I'm not trying to waive that. We're talking about going into trial when I still have pre-trial issues that I have a right to address. *So having standby counsel would restrict me to preparing to go to trial rather than my full range of pre-trial issues because ancillary services of a paralegal will allow me to maintain my full option of choices*. So I prefer a paralegal because I do not wish to waive.
>
> "THE COURT: Okay. I won't appoint standby counsel. I'll appoint a paralegal." (Italics added.)

Appellant's investigator had located a paralegal, and the court informed appellant that he, appellant, would have to approve of the person's qualifications. The court then allowed appellant to choose his own trial date, which was June 23, 2015.

On May 4, 2015, appellant filed a document alleging the paralegal he chose did not comply with Business and Professions Code section 6450, and on May 15, 2015, the court relieved the paralegal based on appellant's assertions. On May 26, 2015, an attorney who was supervising the paralegal filed a letter with the court indicating that the paralegal was qualified. The paralegal also filed a letter with the court. In the paralegal's letter, he stated that he had been working on appellant's case since March and had met with appellant. He indicated the court had issued an order in April to clarify whether he would be working as a paralegal or a legal document preparer. He also indicated he was working with county counsel to provide them the proper documentation so that he could be compensated for the time he already spent on the case and to continue working on the case. On May 27, 2015, appellant filed a motion requesting advisory counsel. On June 2, 2015, the court issued an order authorizing advisory counsel. The court's order authorizing advisory counsel confirmed the trial date of June 23, 2015, and stated that advisory counsel shall accept the appointment with the understanding that the trial date was firm. There is no evidence on the record that appellant attempted to continue utilizing the services of the paralegal after the letters had been filed.

On June 22, 2015, appellant, through advisory counsel, moved to continue the trial on the ground that counsel had not had sufficient time to prepare. The trial court denied the continuance request. The trial, however, was trailed to July 7, 2015.

On July 2, 2015, appellant filed a motion to continue the trial date on the ground he had not received the ordered and requisite access to adequate legal research and resources. Appellant indicated the court had informed advisory counsel that he could not prepare a pretrial writ petition for appellant because his role was limited to trial preparation. The motion stated, "Defendant contends that a pretrial writ is a motion before trial and is critical to *the relief that he's sought for the last 26 months*." (Italics added.)

The trial was ultimately trailed to July 14, 2015. On that day, the court heard appellant's motion to continue and continued the matter to the following day to hear testimony regarding appellant's access to legal research. On July 15, 2015, the court examined a Merced County Sheriff lieutenant and a sergeant regarding appellant's access to legal research. The court indicated that it notified the lieutenant to allow appellant law library time. The lieutenant testified he notified the dayshift sergeant of the communication. He testified appellant had requested law library time and was refused because the facility does not have a law library and uses a legal research request system instead. The lieutenant testified it would be time consuming and use manpower to provide court law library access, but they would do it if it was court ordered. The lieutenant then testified appellant has unlimited access to the legal research request system where he could request information on a form and receive it within three to four days. The lieutenant said he was informed appellant sent one request "[q]uite some time ago." The sergeant testified he gave appellant the research forms four to five weeks prior. Appellant stated he had put in a request in early June but to date had not received any materials in response to his request.

After hearing the testimony from the sheriff's department and argument from appellant, the court had the following exchange with appellant:

> "THE COURT: [T]he central issue in the trial is identity, okay. And the only evidence that the People have regarding identity is [Evidence Code section] 1101(b) [(1101(b))] evidence, okay, these prior robberies. And—if I'm correct, okay. So the central issue has to be focused on the 1101(b) issues related to [number 3 out of four robberies]. [¶] … [¶] … So there is three other cases where it's 1101(b) issues, that's the whole case. That's the whole case is the 1101(b) admissibility issues and whether or not it's enough to support a finding beyond a reasonable doubt that Mr. Frazer is the person who committed the Livingston robbery, that's the issue. [¶] … [¶] [I]t's [a] fairly narrow issue and I think I appointed [advisory counsel] to assist you with respect to that trial issue, which is the central issue in the case.
>
> "[APPELLANT]: Your Honor, the thing of it is, is that you asked me because I'm counsel to choose what I prefer to do. Now I advised the Court and informed the Court that I was not willing to give up my right to have access to law library and to do my preliminary challenges. I need to have access to law to do that. I had a choice in February to choose advisory counsel or co-counsel to go to trial with the narrow parameters that it was for trial only. At that time I waived that. I said I prefer to have a paralegal who's less trained but allow me to have the full range of pretrial challenges that I require.
>
> "Now we're talking about 1101(b), we're talking about in trial. I have pretrial challenges that I have a right to. I have a right to writ objections to Court rulings that would make a trial not necessary. And I have very strong issues that I've been waiting for eight months to put before a writ, but I can't research. I can't get the proper law.
>
> "Now I've been told by advisory counsel that my issues have merit that, in fact, they're strong, but he's been hamstrung by the Court to where he can't help me. He feels he should be able to but he does not want to buck the Court, he's going to stay in the parameter in which you gave him.
>
> "I've been rendered incompetent because I do not have access. Someone that's been assigned to me who do has [*sic*] the knowledge to do what I need done has been told not to do it, so the defense has been neutralized totally. Today is to determine whether I have access, clearly we know now we do not. Faretta [sic] says I have the right to these things. So

> I think that is the question, not 1101(b), not a trial issue, is do I have a right. A Faretta right, a constitutional right to adequately prepare to represent myself before this court. I'm saying that if I have these things this matter would be over with forthwith. There is no need for this case to take this long when all I asked for is the constitutional right of access to proper law library. Right now I have zero, zilch, Nada, I have nothing.
>
> "THE COURT: You're putting the cart before the horse. You haven't been found guilty of anything yet by a trier of fact. However, should that occur the issues that you all raised were preserved for purposes of appeal."

The court went on:

> "I will state for Mr. Frazer's benefit on the record that the access that the Court expected Mr. Frazer to have did not meet my expectations. I expected to have some law library time. But he has stated he really wants the law library time to address issues that have already been ruled upon. [¶] … [¶] And that—or are collateral issues not to the one of whether or not he is the person who robbed the Livingston bank on November 6, … 2009, that's the issue that needs to go forward. That's the most pressing issue."

The court denied the motion to continue trial and the matter proceeded immediately to trial.

At trial, appellant's advisory counsel prepared and argued motions in limine. He objected to admission of the Evidence Code section 1101, subdivision (b) evidence and cell phone records, and hearings were held pursuant to Evidence Code section 402. He conducted most of the cross and direct examinations of witnesses. He made several objections and delivered the defense's closing argument.

After trial, the court ordered the sheriff's department to provide supervised visits at the law library three hours per day, three times a week. On January 29, 2016, appellant informed the court he had not been transported to the law library as was previously ordered, and the court ordered a hearing to show cause why the jail had not transported appellant to the library. More information was adduced about appellant's access to legal research, including that inmates can make requests for general information and that appellant had never made a request for research materials in the entire time he had been

in custody pursuant to the request logs. After the hearing, the court rescinded the previous order regarding the law library.

B. Analysis

A defendant who knowingly and intelligently waives the right to counsel possesses a right under the Sixth Amendment of the federal Constitution to conduct his or her own defense. (*Faretta*, *supra*, 422 U.S. at pp. 835-836.) The right to self-representation, " 'includes the right to reasonably necessary defense services.' " (*People v. Blair* (2005) 36 Cal.4th 686, 732 (*Blair*), overruled on other grounds by *People v. Black* (2014) 58 Cal.4th 912.) However, inmates do not have an "abstract, freestanding right to a law library or legal assistance, [and] an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." (*Lewis v. Casey* (1996) 518 U.S. 343, 351.) "[D]epriving a self-represented defendant of '*all means of presenting a defense*' violates the right of self-representation." (*Blair*, at p.733, italics added.) Generally, only this complete denial of any means to mount a defense infringes a defendant's right under *Faretta* to represent himself or his or her right to access the court. (See, e.g., *Milton v. Morris* (1985) 767 F.2d 1443, 1445-1447 (*Milton*); *United States v. Wilson* (1982) 690 F.2d 1267, 1273.)

The "crucial question" is whether a self-represented defendant had reasonable access to ancillary services reasonably necessary for his defense under all the circumstances. (*Blair*, *supra*, 36 Cal.4th at pp. 733-734.) To be entitled to a reversal, a defendant must show both error and resulting prejudice. (*Id*. at p. 736.)

We find there is ample evidence on the record to support that appellant had reasonable access to legal resources to present his defense under the circumstances. We find this issue can be resolved on the fact appellant was appointed advisory counsel to help him prepare for trial and undertake an active role during trial. It is well settled the provision of advisory counsel and reasonably necessary investigative assistance

sufficiently protects the Sixth Amendment rights of propria persona inmates. (*People v. Butler* (2009) 47 Cal.4th 814, 827; *People v. Jenkins* (2000) 22 Cal.4th 900, 1040; see *Blair*, *supra*, 36 Cal.4th at pp. 732–733; *People v. Ringo* (2005) 134 Cal.App.4th 870, 876–877.) Advisory counsel prepared motions in limine, conducted voir dire of the jurors, moved to exclude the Evidence Code section 1101, subdivision (b) evidence and cell phone records, on which Evidence Code section 402 hearings were held, conducted most of the cross and direct examinations of witnesses, made several objections throughout the trial, and delivered closing argument.

We are not persuaded by appellant's argument that the appointment of advisory counsel in this case did not protect his constitutional rights because it was an "eleventh hour" appointment at six weeks before trial. This argument is specious because appellant was offered standby/advisory counsel[2] in February 2015, four months before trial, and he refused solely on the basis that he wanted to bring up issues outside the scope of trial preparation. A defendant does not have the right to dictate what means would be made available to him to prepare his defense. (See *United States v. Wilson*, *supra*, 690 F.2d

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[2] We are aware the trial court used the term "standby counsel" at the February 15, 2015, hearing. We are also aware that some courts have defined "advisory counsel" as counsel "who is present in the courtroom at the defendant's side, does not speak for him, and does not participate in the conduct of the trial but only gives him legal advice" and "standby counsel" as counsel "who is present in the courtroom and follows the evidence and proceedings but does not give legal advice to the defendant. He 'stands by' in the event it is necessary for the trial court to revoke defendant's in propria persona status or even remove the defendant from the courtroom because of disruptive tactics so the case may proceed in an orderly manner to verdict." (*Chaleff v. Superior Court* (1977) 69 Cal.App.3d 721, 731, fns. 6 & 7 [conc. opn.].) However, the terms "advisory counsel," "standby counsel," and "co-counsel" have been "loosely used" by the courts in describing the multitude of situations in which the accused and professional counsel are involved in presentation of the defense case. (5 Witkin, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 306.) Here, the court told appellant "standby counsel" would be available to appellant to "assist and advise." We feel the term is being "loosely used," and the level of participation the court described would have sufficiently protected his constitutional rights to self-representation and access to the courts.

1267; see also *Milton*, *supra*, 767 F.2d at pp. 1447-1448 [conc. opn. of Hug, J.].) Appellant's arguing on appeal that he was kept from preparing for trial for 26 months seems disingenuous when at one point he voluntarily chose to forego the appointment of advisory counsel for the stated purpose of avoiding preparing for trial.

In addition to having advisory counsel, appellant was provided with an investigator who appeared with appellant at many court appearances, served several subpoenas, and it also appears from the record he provided cases and other legal resources to appellant. Though the record is unclear as to exactly what books appellant had access to, he clearly had access to a practice manual at a very early stage in the proceedings based on the many motions he filed with citations to law. He was also able to get copies of cases and had access to a telephone. He also had access to a legal research request program that was affirmed as being adequate access to legal research in *People v. James* (2011) 202 Cal.App.4th 323. Though appellant indicated to the court he had tried to use the service and did not receive materials in response to his request, it was revealed after trial appellant had never made such a request, as indicated by the request logs. He also received assistance from a paralegal, at his request and in lieu of being appointed advisory counsel, from March 2015 to April 2015. Appellant later alleged this paralegal was unqualified, but the record indicates he was properly supervised by an attorney and thus qualified. He did not make an effort to utilize that paralegal after alleging he was not qualified, but rather moved for advisory counsel instead.

Appellant's argument is primarily focused on his denial of personal access to a law library for the 26 months he was awaiting trial. We first note that access to a law library is not the only constitutionally permissible way to provide a defendant with sufficient ancillary services. (*Bounds v. Smith* (1977) 430 U.S. 817; *Milton*, *supra*, 767 F.2d 1443; *Kane v. Garcia Espitia* (2005) 546 U.S. 9, 10.) There is no Sixth Amendment right to law library access where a propria persona defendant is assisted by advisory counsel. (*People v. Ringo*, *supra*, 134 Cal.App.4th at p. 877.) Thus, for the

reasons already stated, we find appellant was provided with reasonable services to prepare his defense.

It must be noted it is abundantly clear from the record appellant's primary focus throughout most of the period he was awaiting trial was not preparing his defense for trial but challenging the order holding him to answer. Not only did appellant get several chances to litigate these issues himself, his appointed counsel litigated them as well. There is no question his rights were protected in regard to these pretrial issues. Just after his appointed counsel advised him a writ challenging the court's denial of appellant's nonstatutory motion to dismiss would likely be unsuccessful, appellant executed another *Faretta* waiver. His next decision was to file a 100-page motion to disqualify the prosecutor bringing up the same evidentiary issues at the heart of his motion to dismiss. We find this strongly implies appellant discharged his attorney because he wanted to continue to bring up these evidentiary issues from the preliminary hearing. Up until the day trial commenced, appellant continued arguing for an opportunity to raise more, what the trial court referred to as, "collateral" issues, which at that point was a motion to audit the transcript. He later brought this motion after trial, and it was denied as having no legal basis. Appellant cannot now raise he was deprived of an opportunity to prepare his defense when he made it very clear throughout the proceedings that he had no intention of using the ancillary services to prepare his defense but rather wanted them in order to relitigate multiple iterations of the same motion and avoid trial. For many of these reasons, appellant cannot claim prejudice; there is no evidence on the record he would have used ancillary services to prepare his defense or that he would have been any more prepared for trial issues than he was.

We find the services appellant was provided were reasonable under the circumstances, and that he has not established any violation of his Sixth Amendment right to self-representation, his right to due process, his right to access to the courts, or any other constitutional right.

II. Motion to Continue the July 14, 2015, Trial Date

Appellant argues the trial court erred when it denied appellant's motion to continue the July 14, 2015, trial date. We disagree.

A. Relevant Background

On July 7, 2015, appellant filed a written motion to continue the July 14, 2015, trial date on the ground that he had "not received the ordered and requisite access to adequate legal research and resources to prepare and defend himself at trial." In this motion, he noted advisory counsel, which had been appointed on June 2, 2015, was not authorized to do a "pretrial writ," only trial preparation.

The hearing on the motion was held on July 14, 2015. Appellant argued he wanted to have a hearing regarding his access to the law library and a paralegal. In response to appellant's request for a paralegal, the court stated, "You don't get both. Okay. [¶] By appointing [advisory counsel] I think I have ... provided you a reasonable means of preparing the necessary pleadings for trial, and also providing you with a licensed attorney to advise and assist you during the trial." In response, appellant told the court that advisory counsel cannot assist him with pretrial writs. The court held a hearing the next day on what access appellant had had to the law library and indicated he would rule on the motion for continuance after hearing the testimony. The court held that even though appellant did not have the access to the library the court had expected, appellant had indicated he wanted access in order to litigate collateral issues and the court denied the motion on the basis of inadequate access to legal research.

Appellant then informed the court he received updated DNA reports the week prior. The deputy district attorney informed the court appellant had received the original DNA reports two years ago, and the updated reports reflected a slight variation to the results and read an email from the prosecution's DNA expert wherein she stated, "These are minor changes and do not change the interpretation." The deputy district attorney

indicated that he forwarded the updated reports immediately after receiving them from the DNA expert. The court denied a continuance on that basis.

Appellant also told the court he was informed he was going to be receiving cell phone records that day. The court indicated it had received subpoenaed cell phone records on June 18, June 22, and June 26. The deputy district attorney informed the court he had forwarded the same cell phone records to appellant two years prior. In response, appellant stated he would not have enough time to verify that the records provided pursuant to the subpoena were the same as the records he had already received. The court denied the motion for continuance on that basis and asked for a stipulation that the subpoenaed records could be released for appellant's review. Copies of the subpoenaed records were provided to appellant.

The trial commenced that afternoon.

B. Analysis

The determination whether to grant a motion for a continuance of trial rests within the sound discretion of the trial court. (*People v. Cruz* (2008) 44 Cal.4th 636, 687.) A continuance of a criminal trial may be granted only for good cause, and the trial court has broad discretion to determine whether good cause exists. (§ 1050, subd. (e); *People v. Alexander* (2010) 49 Cal.4th 846, 934.) Appellant must demonstrate some resulting prejudice from denial of a continuance. (*People v. Laursen* (1972) 8 Cal.3d 192, 204.) A court abuses its discretion in denying a continuance only when the court exceeds the bounds of reason, all circumstances being considered. (*People v. Beames* (2007) 40 Cal.4th 907, 964-965.)

Appellant's first proffered ground for a continuance was his denial of access to the law library. He did not allege he had not had enough time to prepare for trial. Rather, he alleged advisory counsel was not adequate because he was limited to trial preparation and could not assist appellant with a writ petition. Seeking appellate review of a previous denial of a motion does not constitute good cause for continuance. (*People v. McKenzie*

(1983) 34 Cal.3d 616, 639, fn. 6, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346.) We find no abuse of discretion by the court in denying the continuance on this basis.

We also find the court was within its discretion in denying the motion on the basis of alleged "late" production of discovery. Appellant had received the DNA reports two years prior, and the deputy district attorney asserted the expert's conclusions were not altered by the updates. Moreover, any error in denying the continuance on this basis is clearly harmless under any standard. The DNA reports were used to link appellant to the first two uncharged robberies. Appellant admitted he committed those robberies during his testimony. Having extra time to investigate the updates to the DNA reports would not have affected the outcome in any way.

The cell phone records had also been produced two years prior. The court ordered the subpoenaed copies unsealed so that appellant would have a chance to compare them to the copies he had. Any error in denying the continuance on this basis is also harmless under any standard, as appellant had had copies of the subpoenaed cell phone records for two years. He presumably had enough time to do whatever investigation necessary regarding their contents, as there was never an allegation the records were not accurate copies of what had already been produced to appellant.

Appellant for the first time on appeal alleges that the production of a witness list with new witnesses and advisory counsel not having enough time to prepare for trial constituted good causes for a continuance. We find these challenges forfeited, as appellant did not raise them below.

Appellant also argues the denial of the continuance violated his right to due process of law. In determining whether a denial of a motion for continuance was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590.) Because we do not find the court's holding was arbitrary, much less so

arbitrary as to deny due process, we find there is no violation of appellant's right to due process of law.

III. Admission of Cricket/AT&T Cell Phone Records

Appellant contends the trial court prejudicially erred when it admitted Cricket Communication ("Cricket")/AT&T cell phone records related to his phone number. Included in these records were cell site location details which placed appellant in the same vicinity of the robbery around the time it occurred. Appellant alleges the proper foundation was not and could not have been laid in order to bring them within the business records hearsay exception.

A. Relevant Background

Appellant's advisory counsel objected to the admission of the cell phone records based on foundation. A hearing pursuant to Evidence Code section 402 regarding the cell phone records was held midtrial, at which the prosecution's wireless expert testified. The expert witness testified he had been in the wireless industry for over 28 years and had been trained by virtually every major carrier: Cricket, AT&T, Contel, GTE Mobile Net, Sprint, Nextel, Boost, Metro PCS, Verizon, T-Mobile, Mountain Cellular, Golden State Cellular, "just to name a few." He identified call detail records related to appellant's phone number.[3] The records covered the period from 9/2/2009 through 12/5/2009. The expert testified he received copies of the records in 2010 from the Livingston Police Department, which had obtained them from Cricket pursuant to a search warrant. A copy of the search warrant, dated February 8, 2010, was received into evidence for the purpose of the hearing. In May 2015, AT&T purchased Cricket. From then forward all Cricket custodian of records requests were directed to AT&T.

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[3] Appellant's name was reflected in the carrier subscriber information in the document. During trial, appellant admitted the phone number the records corresponded to was his.

The expert witness testified that in preparation for trial in 2015, the prosecution had served a subpoena on AT&T. In response, they received a letter saying the records were only maintained for six months and thus had been purged from Cricket's system. The expert testified that, because the records had been purged, the prosecution sent another subpoena to AT&T for certification with the copies of the records it possessed (from the 2010 search warrant) attached. He testified it is a common practice for people who have received the records to send them back to the carrier for authentication and the appropriate documentation.

The prosecution received a response to the subpoena dated June 23, 2015, with an affidavit and the records attached. The affidavit read: "My name is [J.N.]. I am over the age of 18 and qualified to make this affidavit. I am employed by AT&T as a Legal Compliance Analyst and also serve as the Custodian of Records for AT&T/Cricket. I have been employed by AT&T since October 9, 2006. Attached to this Affidavit are true and correct copies of subscriber information and call detail issued by AT&T/Cricket for the following accounts: [¶] [appellant's phone number] [¶] The attached copies of billing records are maintained by AT&T/Cricket in the ordinary course of business. I maintain and routinely rely on these documents in the course of my duties as Custodian of Records and Legal Compliance Analyst."

The expert opened the disc provided by AT&T and identified the call detail records related to appellant's phone number for the period of 9/2/2009 at 8:32:04 through 12/5/2009 at 22:37:19. The expert testified this was consistent with the hard copy he had received back in 2010.

The expert testified he was not personally present at the facility when the records were generated, but he was very familiar with Cricket at the time the records were generated. He testified that the time at which the particular entries were produced is reflected by specific dates and times within the call detail records.

The expert testified he knew the records attached to the affidavit were accurate because he compared the attached records to the copies he had in his files from 2010, and they were the same. The other reason he knew they were accurate was because he had reviewed "hundreds of thousands" of Cricket records, and the format, cell site list, acronyms and characters used, and accompanying documents of how to read the records were all consistent with the Cricket records he had reviewed. Cricket had formatting distinctive from other cellular companies. The cell site information was unique in that they used an alpha character and then a numeric value after that character to depict the market place and the related sector of a specific cell site. The actual cell site number itself was encoded as well. Cricket also had specialized coding. The expert gave an example that a data connection would be referenced on a call detail record by pound 777 and if someone accessed their voicemail, it would be 99. The expert testified there are also other unique characters and special features unique to Cricket depicted in their records.

After hearing the testimony and some argument, the court stated that it seemed J.N.'s affidavit complied with Evidence Code sections 1271, 1560, 1561, and 1562 and thus the burden had shifted to the defense to refute the information in the affidavit. The court indicated the defense's position seemed to be based on prior affidavits by others stating the records had been purged. The court noted the newest affidavit was signed by someone in a different position in that she is a legal compliance analyst and a custodian of the records. The court held there was ample evidence the records were reliable. Appellant's advisory counsel continued to clarify the objection:

> "[ADVISORY COUNSEL]: … Part of the primary point is, there is no evidence that the 2010 documents were certified. So essentially what has happened, fast forward 2015, AT&T … is certifying documents that weren't in their possession and certified documents that there has never been in evidence that they've been certified, and that's putting the cart before the horse. … If there is fault with part one of analysis, the proper authentication at the very beginning you then can't cure it by giving uncertified documents to a non-creator of the documents to simply certify

these are the records. It's clear that the People gave them these uncertified documents so how can we now certify them? [¶] … [¶]

"THE COURT: I'm accepting your version as what happened. … But what changes is that because Cricket had this distinctive format that is a legal analyst and if the affidavits are presumed correct, there is a basis for her to authenticate based on the Cricket formatting that was distinctive and that would appear in the records that were sent to her. [T]hat's the basis for the Court's ruling."

The court overruled the objection to the admission of the cell phone records.

The expert witness testified before the jury at length regarding how cell phones work. He testified cellular phones are transceivers that pickup signals from their carriers' antennas or "cell sites." A computer sends out a signal looking for all customers in its network. When someone makes a call, the computer determines what cell site is closest to the caller. When one is traveling away from the cell site to which it was originally connected, the computer switches the phone to a closer cell site to avoid the call being dropped. When a call, text, or data is placed or received, it creates a "fingerprint" on the carrier's network, and then goes to the customer's bill, which shows the date and number of the call. This is all done by a "big computer."

The expert explained the records to the jury and showed that on November 6, 2009, at approximately 9:59 a.m., appellant's phone was connected to the sector of the cell site which covered the vicinity of the crime scene. The expert explained that according to the cell site data, appellant's phone appeared to be traveling south based on the cell site switches that occurred.

B. Analysis

Appellant makes several arguments regarding the admission of the cell phone records. He argues J.N.'s affidavit is false because the records had been purged in 2010, and the affidavit did not indicate that the business did not have the records described as

required in Evidence Code section 1561, subdivision (b).[4] He contends despite that deficiency, the records were not authenticated pursuant to Evidence Code section 1400. He asserts neither the affidavit nor the expert witness's testimony laid the foundation for admission of the business records hearsay exception because neither indicated the writings were made in the regular course of business or at or near the relevant times and because there was no evidence as to the "mode of preparation" of the records. He argues the records were not established as trustworthy. We disagree.

The trial court is vested with broad discretion to determine whether a party has laid a proper foundation for admission of records under the business records exception to the hearsay rule, and the court's exercise of that discretion will not be disturbed on appeal absent a showing of abuse. (*People v. Zavala* (2013) 216 Cal.App.4th 242, 245–246 (*Zavala*).) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) The fact that another court might have ruled differently "reveals nothing more than that a reasonable difference of opinion was possible. Certainly, it does

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[4] Evidence Code section 1561 sets forth the requirements for an affidavit that is submitted in lieu of testimony qualifying a document as a business record pursuant to Evidence Code section 1271: "(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following: [¶] (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records. [¶] (2) The copy is a true copy of all the records described in the subpoena duces tecum or search warrant.… [¶] (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event. [¶] (4) The identity of the records. [¶] (5) A description of the mode of preparation of the records. [¶] (b) *If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.*" (Italics added.)

not establish that the court … 'exceed[ed] the bounds of reason....' " (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

The business records exception requires a foundational showing that: (1) the writing was made in the regular course of business; (2) at or near the time of the act, condition, or event; (3) the custodian or other qualified witness testifies to its identity and mode of preparation; and (4) the sources of information, mode and method and time of preparation indicate trustworthiness. (Evid. Code, § 1271.) This showing may be satisfied by affidavit. (Evid. Code, § 1561.) " ' "Whether a particular business record is admissible as an exception to the hearsay rule ... depends upon the 'trustworthiness' of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record. [Citations.]" ' [Citation.] 'The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.' " (*Zavala, supra,* 216 Cal.App.4th at p. 246.)

"Although the trial court is accorded discretion in determining whether evidence sufficient to support the trustworthiness of a business record has been introduced, the court cannot ignore favorable evidence merely because the offering party did not follow the standard or preferred method of laying the foundation for admission." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324.) In making the foundational finding, the court may rely on the evidence of trustworthiness and authenticity contained within the documents themselves. (See, e.g., *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 798.) The statutory means for authenticating a writing are not exclusive. (Evid. Code, § 1410.) Authentication of a writing may be established by circumstantial evidence and its contents. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187-1188; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435.) " 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to

the document's weight as evidence, not its admissibility.' " (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.)

The issue of whether cell phone records are admissible as business records was examined in *Zavala*. There, the prosecution offered Sprint and Cricket cell phone records. The Sprint records custodian testified to the way Sprint maintains its cell phone records, cell site information, and text messaging records. He testified Sprint uses a computer system that generates records of each phone call at the time it is made and then transmits the data to a call detail record archive. He testified Sprint maintains the call detail records of its customers for billing purposes and keeps those records in the regular course of business. A customer operations manager at Cricket testified that Cricket uses a computer system that records phone call data at the time of the call on a database, and the call data is kept in the regular course of business. (*Zavala*, *supra*, 216 Cal.App.4th at pp. 244-245.) The admission of the records was challenged on appeal because a human query was used to retrieve the information and the information was produced in the form of an Excel spreadsheet. (*Id.* at p. 245.) The appellate court held that the records were admissible under the business records exception to the hearsay rule. The court followed examples set by other jurisdictions holding that computer data produced by human query falls under the business records exception where the underlying data is automatically recorded and stored by a reliable computer program in the regular course of business. The court found the Sprint custodian and the Cricket customer operations manager had laid the proper foundation to bring the records in under the exception. (*Id.* at pp. 247-248.) The court also pointed out that just because the information was in an Excel spreadsheet, no evidence was introduced to show the printed spreadsheets had been manipulated, inaccurate, or unreliable in any way. (*Id.* at pp. 248-249.)

We note that the California Supreme Court has since recognized that data generated by the computer itself, as opposed to human entry, is simply not hearsay. "Evidence Code section 1200 defines hearsay as 'evidence of a *statement* that was made

other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' ([Evid. Code,] § 1200, subd. (a), italics added.) A statement, in turn, is defined as an 'oral or written verbal expression or ... nonverbal conduct *of a person* intended by him as a substitute for oral or written verbal expression.' ([Evid. Code,] § 225, italics added.) ' "Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.' ([Evid. Code,] § 175.)" (*People v. Goldsmith*, *supra*, 59 Cal.4th at pp. 273-274.) Photographs, videos, and data captured and reported by the computer, such as date, time, and location, are types of information generated by a machine, not a person, and are not *statements* by a *person* as defined by the Evidence Code and thus are not hearsay and do not require a hearsay exception to be admissible. (*Ibid*.; see *People v. Rodriguez* (2017) 16 Cal.App.5th 355.) Nonetheless, whether the records here constituted hearsay is not an issue on appeal, and *Zavala* remains good law on the issue of admission of cell phone records such as the ones in question here. We find the court was within its discretion to find the proper foundation was laid to admit the cell phone records as a business record.

We realize one of the factors distinguishing the present case from *Zavala* is that AT&T was only in possession of the records at the time J.N. certified them as authentic because the prosecution had provided them.[5] Here, copies of the cell phone records in

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[5] The Second Appellate District recently decided a case wherein the appellant sought to introduce medical records that had been destroyed by the hospital that had generated and maintained them. The appellant had obtained copies of the records pursuant to a subpoena directed to the sheriff's office. (*People v. McVey* (2018) 24 Cal.App.5th 405, 415, review den. Sept. 19, 2018.) The appellate court held the records were inadmissible because the party offering them did not attempt to authenticate them in any way nor could they because the entities that were the source of the records could supply no information about who prepared the documents, the circumstances and method of preparation, how the records were maintained by the hospital, or even whether the copies provided were the complete records. (*Ibid*.) The present case is distinguishable because evidence was presented that supported the finding that the custodian could authenticate the records without having personally populated them from her system.

question were obtained via search warrant unaccompanied by an affidavit in February 2010 and were subsequently purged. Still in possession of the records obtained pursuant to the search warrant, the prosecution sent the records to AT&T to obtain the proper certification. In response, AT&T legal compliance analyst and custodian of the records, J.N., essentially forwarded the records the prosecution had provided attached to an affidavit identifying the documents and certifying they were true and correct copies maintained in the regular course of business.

Based on the evidence adduced in the present case, the fact that the records were purged by the source entity does not automatically render them incapable of being authenticated. We find a proper foundation was laid to support that the records were trustworthy by a combination of J.N.'s affidavit, the expert witness's testimony, and the documents themselves.

The trial court found the records were sufficiently trustworthy based on J.N.'s affidavit. J.N.'s affidavit identified the documents[6] and certified them as true and correct copies maintained in the regular course of business.[7] The court relied upon the presumption pursuant to Evidence Code section 1562 that the affidavit was correct. This presumption is one that affects the burden of producing evidence; thus, once presented with evidence contrary to the presumption, the court is required to weigh the evidence

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Moreover, cell phone records generated by computer are inherently more reliable than hospital records containing narratives written by humans.

[6] Appellant argues that the fact the records corresponded to appellant's phone (the identity of the records) is only based on incompetent hearsay evidence. To the extent any error could be established by this, we find the error harmless because appellant admitted during his trial testimony that the phone and phone number in question was his.

[7] Appellant points out J.N. refers to the records as both "call detail" and "billing records." We do not recognize this as a relevant distinction. Appellant has not convinced us the "call detail" records were not also "billing records." Rather, the expert witness's testimony indicates bills are generated by tracking customers' connections to cell sites; call detail records are part of billing records.

without regard to the presumption. (Evid. Code, § 604.) Here, the defense argued that other responses to subpoenas indicated the records were purged after six months and that the affidavit cannot correct the nonexistence of any certification of the 2009/2010 copies. The court accepted the defense's factual assertions that J.N. did not have records to compare to the copies the prosecution sent her and weighed it against the expert witness's testimony that J.N. could have authenticated the records despite not having copies in her possession based on specific indicia within the records identifying them as authentically Cricket. The court concluded that, based on this testimony, J.N.'s statements in her affidavit were true.

We appreciate appellant's concerns regarding J.N.'s affidavit. We acknowledge appellant interprets Evidence Code section 1561, subdivision (b), requiring an affiant to so state if the entity does not have the records, as applying to this case. We find, in spite of appellant's contentions, that the trial court was within its discretion to find that J.N.'s affidavit was reliable. The trial court was not unreasonable in determining that J.N. did not violate the face of Evidence Code section 1561. J.N. did, in fact, have the records described; they had been provided to her with the prosecution's subpoena. This alone may not have been enough to weigh the affidavit in the favor of reliability, except that the court heard evidence it clearly found to be credible despite J.N. not having independent copies of the particular records, that she would have been able to authenticate them as Cricket records. We also note that our role is to examine the trial court's result, and we are not bound by its reasons if we find it came to the correct result. (See *People v. Zapien* (1993) 4 Cal.4th 929, 976.) Thus, we are within our scope of review to find any deficiencies in J.N.'s affidavit were adequately supplemented by the expert witness's testimony.

A trial court has wide discretion in determining whether a qualified witness possesses sufficient personal knowledge of the identity and mode of preparation of documents for purposes of the business records exception. (*Aguimatang v. California*

State Lottery (1991) 234 Cal.App.3d 769, 797 & fn. 28.) Indeed, "any 'qualified witness' who is knowledgeable about the documents may lay the foundation for introduction of business records—the witness need not be the custodian or the person who created the record." (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at p. 324.) Thus, a qualified witness need not be the custodian, the person who created the record, or one with personal knowledge in order for a business record to be admissible under the hearsay exception. (See *id.* at p. 322; 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 243, p. 1108.)

Here, the expert witness testified he had been trained by most major wireless carriers and had extensive knowledge of the distinctions between Cricket's records and other carrier's records. The court was within its discretion in determining the witness was qualified to testify as to the identity and mode of preparation of the documents.

Appellant alleges there was no evidence to show "mode of preparation." While the expert witness did not testify as to the mode of preparation in as much detail as the experts in *Zavala*, we find it is enough that the expert testified at length about how cell phones work in regard to cell sites and that a "fingerprint" is made on a "big computer" when a phone connects to a cell site and is done so for billing purposes. As to whether the entries were created at or around the times of the phone's connections to the cell sites, the expert witness testified that the time and phone number are indicated in the records to reflect when a cellular phone connects to a cell site. It can be reasonably inferred from the expert's testimony that the records are generated by computers and are done so in the regular course of business. The underlying purpose of the business records exception to the hearsay rule is to eliminate the necessity of calling each witness to an act or event and to substitute the record of the transaction instead. (*People v. Crosslin* (1967) 251 Cal.App.2d 968, 975.) In the case of cell phone records, there is no human that exists who could testify to each connection appellant's cell phone made to a cell site; the computer records are not only the best but the only way to prove when a cell phone connects to a cell site. Cricket's obvious requirement of the accuracy of these records

alleviates the need for a witness, if there were one available, to testify to each and every connection to a cell site; thus, these records fall within the purpose of the business records exception. The records are trustworthy because the course of business requires them to be. The court did not abuse its discretion by finding the foundation to establish this had been laid.

Moreover, the expert witness was able to identify the distinctive formatting, appearance, content and internal patterns of Cricket's phone records to authenticate appellant's records. He also testified he knew they were accurate because he compared the records provided by AT&T with the records he had originally received in 2010. The defense made no allegation the records had been tampered with or altered or that the lapse in AT&T's possession caused them to be unreliable.

We do not find, as appellant argues, the trial court made an error of law. We find the affidavit, the expert's testimony, and attached documents could reasonably support a finding that the requirements of Evidence Code sections 1271 and 1561 were satisfied. We cannot say the trial court "exceeded the bounds of reason" in admitting the documents into evidence or that "no judge would reasonably make the same order under the same circumstances." (See *In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898–899.)

DISPOSITION

The judgment is affirmed in all respects.

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DE SANTOS, J.

WE CONCUR:

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LEVY, Acting P.J.

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SMITH, J.